In the Supreme Court
OF THE
United States

OCTOBER TERM, 1976

No. 76-143

ROY SPLAWN,
Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

OPPOSITION OF RESPONDENT TO PETITION FOR WRIT OF CERTIORARI

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OPINIONS BELOW

Petitioner seeks review of a judgment entered by the California Court of Appeal, First Appellate District, Division Three on March 29, 1976. Pursuant to California Rules of Court, Rule 976, it has neither been officially reported, nor published, but is set forth in full as Appendix A of this opposition. That opinion was entered following this Court's vacation of an earlier judgment of the California Court of Appeal rendered on January 11, 1973. See *Splawn* v. *California*, 414 U.S. 1120 (1974). Pursuant to California Rules of

Court, Rule 976, this earlier opinion was neither officially reported, nor published, but is set forth in full as Appendix B of this opposition.

JURISDICTION

Petitioner invokes the jurisdiction of this Court pursuant to Title 28, United States Code section 1257(3).

STATEMENT OF THE CASE

Proceedings in the State Courts

Mr. Drivon, a part-time employee of the Redwood City police department, had known petitioner since 1966, when he first offered Mr. Drivon "hardcore" pornography. In late 1969 Mr. Drivon began negotiating with petitioner's brother Don for the purchase of some "hardcore" films. Don informed Drivon that such films were available at approximately $50 a reel but stated they were not carried in stock at petitioner's bookstore. He thereafter arranged several unsuccessful appointments for Drivon to pick up the films which Don mentioned were being furnished by petitioner.

On November 5, 1969, Drivon met with petitioner at his bookstore to further discuss the purchase of these films. Petitioner made a phone call and stated that he could obtain the films in two days; however, if Drivon were in a hurry, petitioner would drive to San Francisco and pick them up. They settled on the price of

the films, which petitioner stated were normally selling for much more in San Francisco. He also explained to Drivon that he had to be very careful in handing these films since they were "hardcore" material over which he had previously been in trouble with the police. Petitioner assured Drivon that he would be getting strictly "hardcore" material.

When Drivon returned to petitioner's bookstore on November 7 the clerk gave him a package containing two reels of film in exchange for $70. Drivon thereafter contacted petitioner on the phone and from their conversation it was apparent that petitioner had previously viewed these films. Indeed, petitioner admitted at trial that he had viewed the films prior to selling them.

The films themselves were admitted into evidence at petitioner's trial for violating California Penal Code sections 182.1 (conspiracy to distribute obscene material) and 311.2 (distribution of obscene material). He was convicted by a jury on June 22, 1971 of distributing obscene material. Probation was denied, and petitioner was sentenced to county jail for a period of 91 days. One day was suspended and a fine was imposed in the amount of $4,000. Timely notice of appeal to the California Court of Appeal was filed and petitioner was admitted to bail pending that appeal.

On his direct appeal petitioner raised nine issues including an attack on the trial court's instructions concerning "pandering." That issue was resolved adversely to appellant by the California Court of Appeal. See Appendix B, pp. xviii-xx. Thereafter, peti-

tioner sought a hearing before the California Supreme Court which was denied, without opinion, on March 8, 1973.

Proceedings in Splawn v. California, No. 73-200

Petitioner's 1973 application to this court for a writ of certiorari raised only three of the nine arguments he had presented to the California Court of Appeal. They were: constitutionality of the jury selection system; constitutionality of the definition of obscenity in the California statute; and, whether excluding from criminal liability film projectionists was an invidious discrimination against book sellers. Significantly, petitioner did not attack the California Court of Appeal's judgment that the jury was properly instructed on "pandering."

This Court granted certiorari on January 7, 1974, vacated the judgment of the California Court of Appeal and remanded the case "for further consideration in light of *Miller* v. *California,* 413 U.S. 15 (1973); *Paris Adult Theater I* v. *Slaton,* 413 U.S. 49 (1973); *Kaplan* v. *California,* 413 U.S. 115 (1973); *United States* v. *12 200-ft. Reels of Film,* 413 U.S. 123 (1973); *Roaden* v. *Kentucky,* 413 U.S. 496 (1973); and *Alexander* v. *Virginia,* 413 U.S. 830 (1973)."

Proceedings in the State Courts on Remand

Upon receipt of this Court's order vacating its earlier judgment, the California Court of Appeal requested additional briefing on the constitutionality of the definition of "obscenity" as contained in California Penal Code section 311(a). The California Court of Appeal reaffirmed petitioner's conviction on March 29, 1976 in an opinion which substantially republished, without material difference, those portions of its earlier opinion concerning petitioner's claim that the "pandering" instructions were improper. Petitioner's application to the California Supreme Court for a hearing was denied on May 26, 1976 and, the instant petition for a writ of certiorari to review the latest judgment of the California Court of Appeal was filed on July 31, 1976.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. United States Constitution, Amendment I, provides that:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the People peaceably to assemble, and to petition the Government for a redress of grievances.

2. United States Constitution, Amendment XIV, provides, in material part that:

> Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor to deny to any person within its jurisdiction the equal protection of the laws.

3. Title 28, USC Section 2101:

The time for appeal or application for a writ of certiorari to review the judgment of the state court in a criminal case shall be as proscribed by Rules of the Supreme Court.

4. Rules of the Supreme Court, Rule 22(1):

A petition for writ of certiorari to review the judgment of a state court of last resort in a criminal case shall be deemed in time when it and the certified record required by Rule 21 are filed with the Clerk within 90 days after the entry of such judgment. A justice of this Court, for good cause shown, may extend the time for applying for writ of certiorari in such cases for a period not exceeding 60 days.

5. California Penal Code section 311(a) provided, at the time of petitioner's trial, that:

(a) "Obsence matter" means matter, taken as a whole, the predominant appeal of which to the average person, applying contemporary standards, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion; and is matter which taken as a whole goes substantially beyond customary limits of candor in description or representation of such matters; and is matter which taken as a whole is utterly without redeeming social importance.

(1) The predominant appeal to prurient interest of the matter is judged with reference to average adults unless it appears from the nature of the matter or the circumstances of its dissemination, distribution or exhibition, that it is designed for clearly defined deviant sexual

groups, in which case the predominant appeal of the matter shall be judged with reference to its intended recipient group.

(2) In prosecutions under this chapter, where circumstances of production, presentation, sale, dissemination, distribution, or publicity indicate that matter is being commercially exploited by the defendant for the sake of its prurient appeal, such evidence is probative with respect to the nature of the matter and can justify the conclusion that the matter is utterly without redeeming social importance.

* * *

6. California Penal Code section 311.2 provides that:

(a) Every person, who knowingly sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state possesses, prepares, publishes, or prints, with intent to distribute or to exhibit to others, or who offers to distribute, distributes, or exhibits to others, any obscene matter is guilty of a misdemeanor.

(b) The provisions of this section with respect to the exhibition of, or the possession with intent to exhibit, any obscene matter shall not apply to a motion picture operator or projectionist who is employed by a person licensed by any city or county and who is acting within the scope of his employment, provided that such operator or projectionist has no financial interest in the place where he is so employed.

(c) Except as otherwise provided in subdivision (b), the provisions of subdivision (a) with

respect to the exhibition of, or the possession with intent to exhibit, any obscene matter shall not apply to any person who is employed by a person licensed by any city or county and who is acting within the scope of his employment, provided that such employed person has no financial interest in the place wherein he is so employed and has no control, directly or indirectly, over the exhibition of the obscene matter.

QUESTIONS PRESENTED

1. Was the instant petition for a writ of certiorari seeking review of the jury instructions on "pandering" timely filed?

2. Does a California rule of evidence allowing the jury to consider, as probative on the issue of obscenity, petitioner's pandering of obscene material violative of the federal constitution?

3. Does the exemption from the operation of the California Obscenity Statute provided film projectionists who have no financial interest in their places of employment deny equal protection of the law to persons working in book stores?

4. Does petitioner, the owner of a book store with a substantial financial interest in it, have standing to raise an equal protection argument with respect to the exemption for film projectionists?

ARGUMENT

I

INSOFAR AS THE INSTANT PETITION SEEKS TO REVIEW THE CONSTITUTIONALITY OF CALIFORNIA'S RULE OF EVIDENCE CONCERNING "PANDERING", IT IS NOT TIMELY.

Although petitioner challenged the validity of the "pandering" instruction in the California Court of Appeal, he did not present that issue to this Court in his petition for writ of certiorari filed on July 30, 1973 in No. 73-200. In that case, this court vacated the judgment of the California Court of Appeal and remanded for further consideration of the validity of the California Penal Code definition of obscenity. The California Court of Appeal disposed of that issue in an opinion filed on March 29, 1976, and, since this Court had vacated its previous opinion, republished, *in haec verba,* its earlier opinion that the "pandering" instruction was proper. Compare Appendix A, pp. viii-ix with Appendix B, pp. xviii-xx. This Court's opinion in *Splawn* v. *California,* 414 U.S. 1120 (1974), vacating the judgment of the California Court of Appeal did not go to the issue of the validity of the "pandering" instruction, since that issue was not presented by the petition for certiorari. Hence, with respect to this issue, it is respondent's position that the first petition for certiorari was similar to a petition for rehearing which does not challenge the adjudication of an issue and did not therefore extend the time within which to petition for certiorari. *Department of Banking* v. *Pink,* 317 U.S. 264, 266 (1942).

The test of finality, which is a prerequisite to this Court's review of state court judgments, is whether the record shows that the judgment of the highest state court has in fact finally adjudicated the rights of the parties and, that adjudication is not subject to further review in the state courts. *Compare, Department of Banking* v. *Pink, supra, at* 268. With respect to the "pandering" issue, that was the state of the record in this case in 1973. Since the Court of Appeal's 1976 opinion did not disturb or revise the legal rights and obligations of the parties on the "pandering" issue which were settled in its 1973 judgment, and that issue was not presented in the 1973 original petition for certiorari, the rule of *Department of Banking* v. *Pink, supra,* should be applied to deny petitioner a new 90 day period within which to seek review by certiorari of the "pandering" issue. *Compare F.T.C.* v. *Minneapolis-Honeywell Company,* 344 U.S. 206, 212 (1952); *F.T.C. v. Idaho Power Company,* 344 U.S. 17, 20 (1952).

Petitioner is attempting to review, in a piecemeal fashion, the California Court of Appeal's decision affirming his conviction. This is contrary to the principle that litigation must at some definite point be brought to an end. Although none of the authorities relied upon in his argument were decided after the filing of the 1973 petition for certiorari, petitioner does not favor us with any explanation of his failure to raise this issue then. Respondents respectfully urge therefore, that as to the "pandering" issue, the petition for a writ of certiorari is untimely.

II

THE CALIFORNIA COURT OF APPEAL CORRECTLY CONCLUDED THAT THE JURY WHICH CONVICTED PETITIONER WAS PROPERLY INSTRUCTED ON THE DOCTRINE OF "PANDERING".

Initially, respondent notes that since the constitutional tests of obscenity is now less stringent than that found in the California law — "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value" [*Miller* v. *California,* 413 U.S. 15, 24 (1973)], rather than "utterly without redeeming social importance" [See *Bloom* v. *Municipal Court,* 16 Cal.3d 71, 76-77, 127 Cal.Rptr. 317, 320-321 (1976); and *People* v. *Enskat,* 33 Cal.App.3d 900, 910-911, 109 Cal.Rptr. 433, 439-441 (1973), *cert. den.* 418 U.S. 937 (1974)] — petitioner's argument no longer rises to the level of constitutional dignity because the statute he challenges is merely a California rule of evidence and, review by certiorari would be inappropriate. Rules of the Supreme Court, Rule 19.

Petitioner argues that the "pandering" doctrine emanating from *Ginsberg* v. *United States,* 383 U.S. 463 (1966), must be restrained to a narrow field and he contends the trial court exceeded the appropriate limits of this doctrine when it gave the complained of instruction. Relying on a single quotation from *Ginsberg, supra,* at 474, petitioner seeks to restrain the "pandering" doctrine to close cases. But the fact that *Ginsberg* may have been a close case, and the evidence of pandering served to resolve "all ambiguity and doubt" (*Ginsberg, supra,* at 470), does not indicate that the relevancy, as distinguished from the probative

force, of such evidence is any less in other cases. Petitioner also asserts that the "pandering" doctrine is limited to commercial exploitation of the material as distinguished from a mere retail sale. The complained of instruction distinguished between mere commercialism, in the sense of selling the material at a profit, and the promotion of such sales by reference to the prurient appeal of the material. Petitioner's argument that the use of the words "commercial exploitation" are too vague to give adequate notice to retail sellers of what conduct is p oscribed, are similar to argument made against obscenity statutes themselves and have continually been rejected. See *Hamling* v. *United States,* 418 U.S. 87, 117-119 (1974); *Bloom* v. *Municipal Court,* 16 Cal.3d 71, 77-81, 127 Cal.Rptr. 317, 320-324 (1976); and *People* v. *Enskat,* 33 Cal. App.3d 900, 908-910, 109 Cal.Rptr. 433, 438-440 (1973). Moreover, throughout the negotiations for the sale of this material, petitioner assured the buyer that the matter was "hardcore" (RT 44-47).

Petitioner next complains that the instruction improperly referred to the motivation of the creator of the work, a person not on trial or before the court. Although the California Courts have subsequently held this portion of the instruction erroneous, in the absence of evidence the creator was connected with the defendants who are charged with distributing a d exhibiting obscene matter, the error is not necessarily prejudicial. *People* v. *Kuhns,* 61 Cal.App.3d 735, 755, 132 Cal. Rptr. 725, 736 (1976). Petitioner testified that he had viewed the films prior to their sale (RT

633) and conceded to the California Court of Appeal that the jury was properly instructed on the elements of obscenity. Thus, he would bear a heavy burden to establish that any other error in the instructions reached proportions requiring reversal. See *People* v. *Williamson,* 207 Cal.App.2d 839, 842, 24 Cal.Rptr. 734, 736 (1962). Since the jury was properly instructed on the elements of the offense, they could not have been misled that evidence offered on pandering would satisfy all elements of the offense, or that the creators rather than the defendants' acts were under scrutiny. Indeed, there was no evidence before the jury as to the manner in which these films were produced. Hence, they could not have been misled by the fact that the instructions contained a complete reading of California Penal Code section 311(a). *Compare People* v. *Kuhns, supra.* Moreover, the Court of Appeal viewed the films and concluded that the jury did not err in finding them obscene. See Appendix A, p. xii, Appendix B, p. xxii.

Finally, petitioner characterizes the trial court's instructions on the probative value of "pandering" evidence as a retroactive application of a new penal statute. California Penal Code section 311(a)(2) was amended effective November 10, 1969, three days after appellant sold the films which form the basis for his conviction. That amendment provided that evidence matter was commercially exploited by the defendant for the sake of its prurient appeal is probative with respect to the nature of that matter and can justify the conclusion that the matter is utterly without re-

deeming social importance. The amendment did not aggravate the punishment for the offense, create a crime which did not previously exist, or lower the standard of proof required for conviction. Thus, it is similar to an amendment allowing a wife to waive the marital privilege, or the admission of handwriting exemplars. As such, the controlling date under California law for its application, is the trial date rather than the date of the criminal offense. *Compare People* v. *Bradford,* 70 Cal.2d 333, 343-344, ftn. 5, 74 Cal. Rptr. 726, 731 (1969); *People* v. *Snipe,* 25 Cal.App.3d 742, 747-748, 102 Cal.Rptr. 6, 9 (1972). Three years before petitioner sold these films this court recognized the probative value of evidence that a defendant was exploiting, for commercial purposes, material openly advertised to appeal to the erotic interest in his customers. *Ginsberg* v. *United States,* 383 U.S. 463 (1966). Thereafter the California courts held that evidence of commercial exploitation to prurient interest would justify a conclusion that the material offered was utterly without redeeming social value. *Landau* v. *Fording,* 245 Cal.App.2d 820, 824, 54 Cal.Rptr. 177, 179-180 (1966), affirmed per curiam 387 U.S. 456 (1967).[1] Thus, the probative value of the manner in

[1]In *Ginsberg v. United States, supra,* the defendant's conviction was affirmed solely on the grounds of pandering since the material offered was found not to be obscene. There was a suggestion in *Landau v. Fording, supra,* 245 Cal.App.2d at 830, 54 Cal.Rptr. at 183, that a like result was possible under California law. But that finding was dicta since the material at issue there was found to be obscene. Subsequently, in *People v. Noroff,* 67 Cal.2d 791, 793, 63 Cal.Rptr. 575, 576 (1967) the California Supreme Court specifically disapproved *Landau v. Fording, supra,* insofar as it suggested that California recognized as a crime the "pandering" of non-obscene material.

which obscene material is purveyed was recognized in California long before petitioner's sale of these films and he has not therefore been subjected to any ex post facto or retroactive application of the criminal laws of the State of California.

III

THE CALIFORNIA OBSCENITY STATUTE WHICH EXEMPTS FILM PROJECTIONISTS WHO HAVE NO FINANCIAL INTEREST IN THEIR PLACE OF EMPLOYMENT FROM CRIMINAL LIABILITY, DOES NOT DENY PETITIONER EQUAL PROTECTION OF THE LAW IN VIOLATION OF THE FOURTEENTH AMENDMENT.

Petitioner contends that California Penal Code section 311.2 is unconstitutional in that it violates the equal protection clause of the Fourteenth Amendment by providing an exemption for projectionists while leaving clerks in bookstores subject to prosecution. California Penal Code section 311.2(b) provides in pertinent part that the criminal sanctions on the exhibition of obscene matter do not apply to a motion picture operator or projectionist who is employed by a person licensed by any city or county and who is acting within the scope of his employment. It is provided, however, that such operator or projectionist must have no financial interest in the place wherein he is employed.

Petitioner argues he has been denied the equal protection of the law since a similar exemption is not pro-

vided for persons working in bookstores.[2] Contrary to petitioner's assertion [See Petition, p. 20, lines 3-5], a person who operates a motion picture projector is not entitled to the benefits of this exemption if he is the only person on the premises, supervises the operation, collects or takes responsibility for the receipts, or in effect is in charge of the operation. *People* v. *Stout,* 18 Cal.App.3d 172, 176, 95 Cal.Rptr. 593, 595-596 (1971).

There is a valid distinction upon which the California Legislature acted between the classes of "motion picture operator or projectionist" and "bookstore clerk." The licensing requirements for a motion picture theater in many cities and counties restrict the class of persons authorized to operate the projection equipment in order to insure the safety of the audience. Moreover, many theater owners have contracts with labor unions limiting those who can operate the projection equipment in their theaters to members of a particular union. If these groups were to fear prosecution simply for running a projector, without any control over the film's content or the audience make-up, a chilling effect on protected speech might

[2]The evidence in this case is quite clear that petitioner was not a mere employee of a bookstore but rather its owner, i.e., "One who had a substantial financial interest in the place wherein he is employed." As such, respondent submits petitioner does not have standing to raise an equal protection argument.

> "[O]ne to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional." *United States v. Raines,* 362 U.S. 17, 21 (1960), and the cases cited therein.

result from the precautions this group would be forced to take for their own protection.[3] Petitioner has failed to show this classification is palpably arbitrary and without a sound basis in reason. Absent such showing a classification based on legislative experience is presumed valid and will not be rejected. *Compare Fleming* v. *Nestor,* 363 U.S. 603, 612 (1960).

This exemption granted projectionists does not have a potentially inhibiting effect on protected speech. Nor, does it require petitioner to act at his peril at the expense of the free dissemination of ideas. *Compare Winters* v. *New York,* 333 U.S. 507, 510, 517-518 (1948). Rather, it is an attempt to narrowly tailor California Penal Code section 311.2(a) to the objective sought by the Legislature and the requirements of the equal protection clause as applied in the area of First Amendment rights. *Compare Chicago Police Department* v. *Mosley,* 408 U.S. 92, 101 (1972). Indeed, the California Legislature recently amended Penal Code section 311.2 by adding subsection (c) which exempts employees of licensed premises who in the course of their employment have no control, direct or indirect, over the exhibition of obscene matter on these premises.

[3]It is because this exemption avoids an invidious prior restraint on the exercise of the right to free expression that under the requirements of *United States v. Raines, supra,* petitioner has no standing to challenge this statute on equal protection grounds. Since this statute does not restrict anyone's right to free expression the exemption to the standing requirements recognized in *Smith v. California,* 361 U.S. 147, 151 (1959) does not apply.

CONCLUSION

For the reasons set forth above, the People of the State of California respectfully request that the petition for writ of certiorari be denied.

Dated, November 5, 1976.

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(Appendices Follow)

APPENDICES

Appendix A

(NOT TO BE PUBLISHED IN OFFICIAL REPORTS)

In the Court of Appeal
State of California
First Appellate District

DIVISION THREE

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1 CRIMINAL No. 10,255
(SUP. CT. No. C 123)

People of the State of California,
Plaintiff and Respondent,
vs.
Roy Splawn,
Defendant and Appellant.

[Filed Mar. 29, 1976]

OPINION

This is a pornography case here on remand from the United States Supreme Court. Judgment of this court was entered on January 11, 1973, affirming appellant's conviction of violation of Penal Code section 311.2 (distribution of obscene material). Appellant's petition for writ of certiorari was granted. On January 7, 1974, judgment of this court was vacated and the cause remanded for consideration of this court in light of *Miller* v. *California,* 413 U.S. 15; *Paris Adult*

Theatre I v. *Slaton,* 413 U.S. 49; *Kaplan* v. *California,* 413 U.S. 115; *United States* v. *12 200-ft. Reels of Super 8mm. Film,* 413 U.S. 123; *United States* v. *Orito,* 413 U.S. 139; *Heller* v. *New York,* 413 U.S. 483; *Roaden* v. *Kentucky,* 413 U.S. 496; and *Alexander* v. *Virginia,* 413 U.S. 836.

In *Miller,* the court arrived at standards for testing the constitutionality of state legislation regulating obscenity and it is against these standards that we are directed to consider the conviction of appellant. Although *Miller* involved the same statute of which appellant stands convicted (Pen. Code, § 311.2), the court remanded Miller's case considering that an existing state statute, while not couched in terms of the new requirements, might have been previously construed in such a way as to meet new specificity requirements.

This court ordered the recall of its remittitur on February 14, 1974, and on August 1, 1974, the parties having so stipulated, the submission of the cause was vacated to await the resolution of the constitutionality of the California statute, a question then again pending in the federal courts. The question has now been decided by the California Court in *Bloom* v. *Municipal Court* (1976) 16 Cal.3d 71, in which it was held that Penal Code section 311 satisfied the requirement of specificity articulated in *Miller.* The Supreme Court ruled that section 311 "has been and is to be limited to patently offensive representations or descriptions of the specific 'hard core' sexual conduct given as examples in *Miller I,* i.e., 'ultimate sexual acts, normal or

perverted, actual or simulated,' and 'masturbation, excretory functions, and lewd exhibitions of the genitals.' (413 U.S. at p. 25.) As so construed, the statute is not unconstitutionally vague." (16 Cal.3d at p. 81.)

We turn now to other issues raised by appellant Splawn in the appeal from the judgment convicting him of violation of section 311.2 of the Penal Code and since our previous opinion has been vacated, now affirm the judgment of the lower court for the reasons explained below:

Appellant was charged with selling to one Drivon two reels of movie film depicting sexual activity between two persons and three persons, including sexual intercourse, oral copulation and sodomy. Appellant at that time claimed that Penal Code section 311.2 is unconstitutional in that it violates the equal protection clause by exempting projectionists from its provisions while leaving clerks of bookstores subject to prosecution. Appellant, however, was not a clerk in a bookstore but rather its owner. The rule permitting a person to attack a statute only on constitutional grounds applicable to himself precludes appellant from raising this point. "The rule is well established . . . that one will not be heard to attack a statute on grounds that are not shown to be applicable to himself and that a court will not consider every conceivable situation which might arise under the language of the statute and will not consider the question of constitutionality with reference to hypothetical situations. (Citations.) Petitioner has not shown that the statute is being invoked against him in the aspects or under the circum-

stances which he suggests, and hence may not be heard to complain." (*In re Cregler,* 56 Cal.2d 308, 313; *People* v. *Maugh,* 1 Cal.App.3d 856, 862; compare *In re Davis,* 242 Cal.App.2d 645, 666.)

Appellant also attacks the constitutionality of this section on the additional ground that it goes beyond the area of legitimate state control. His position is that a state can only make criminal the dissemination of obscene material to juveniles, unwilling adults, or the "pandering" of such materials to prurient interest. This position was rejected by the California Supreme Court in *People* v. *Luros,* 4 Cal.3d 84. Here, as in *Luros,* evidence discloses commercial distribution of obscene material. The films in the present case were sold for $70.00.

In addition to his attack on the constitutionality of section 311.2, appellant contends that the jury was improperly selected, that the jury was improperly instructed, and that the evidence is insufficient to support the conviction. None of these contentions may be sustained.

Appellant contends that the jury was improperly selected in that prospective jurors were excluded from the venire because they had not been residents of the county for one year. Appellant argues that the residency requirement incorporated in Code of Civil Procedure section 198 deprives him of his constitutional right to trial by a jury selected from a cross-section of the entire comunity.

It is clear that certain groups united by common interests or characteristics may not be excluded from

jury service. The United States Supreme Court has listed six bases on which groups may not be excluded—economic, social, religious, racial, political, and geographical. (*Thiel* v. *Southern Pacific Co.,* 328 U.S. 217, 220.) It has recently been argued that exclusion in Code of Civil Procedure section 198 of persons under 21 was impermissible but this argument was rejected in *People* v. *Hoiland,* 22 Cal.App.3d 530, wherein the court pointed out that it was "'highly speculative whether the decisional outlook of such excluded persons would be different than that of persons a mere few years older.'" (*People* v. *Hoiland, supra,* at 536, quoting *King* v. *United States,* 346 F.2d 123, 124.) Such an observation is clearly pertinent with regard to the residence requirement. Persons residing in a county under one year come from either sex and from all racial, religious, political and economic groups. They comprise no cohesive group and their exclusion does not deprive a defendant of his right to be tried by a cross-section of the community.

Appellant also argues that the residence requirement arbitrarily deprives a section of the community of their right to be considered for public service. He relies on recent cases wherein certain residency requirements for voting and pursuing elective office have been held to serve no legitimate state interest. (See *Keane* v. *Mihaly,* 11 Cal.App.3d 1037, one-year requirement for voting; *Camara* v. *Mellon,* 4 Cal.3d 714, three-year requirement to run for city council; *Zeilenga* v. *Nelson,* 4 Cal.3d 716, five-year requirement to run for board of supervisors.) These cases have

reached the courts by way of petitions brought by persons denied the right to vote or run for office. Assuming *arguendo* that the residency requirement for service on a petit jury is subject to the same principles, the requirement should be challenged by those denied the right to serve. The defendant in a criminal case is not prejudiced by the denial of the right to serve on a jury by virtue of the residency requirement. His right is to be judged by a cross-section of the community and this right is not prejudiced by the residency requirement. Any error in this regard would not require reversal of this case.

Appellant argues that the jury was misinstructed as to the definition of the word "knowingly" as used in Penal Code section 311(e) and Penal Code section 311.2. The sale of the films occurred on November 7, 1969, and it is the law on that date which applies here.

Between 1961 and 1969, Penal Code section 311(e) provided that "knowingly" meant having knowledge that the matter was obscene. Prior to 1961, the prosecution had to establish that the defendant knew the content of the material but it was not necessary to show that he also knew it was obscene. (*People* v. *Harris,* 192 Cal.App.2d Supp. 887, 892, reversed on other grounds; *In re Harris,* 56 Cal.2d 879; *People* v. *Williamson,* 207 Cal.App.2d 839, 846, disapproved on other grounds, *In re Giannini,* 69 Cal.2d 563, 577.) In 1961 this section was amended to provide that the defendant had to have knowledge that the matter was obscene. This was not interpreted to mean knowledge

that a court would decide the matter was obscene. A reasonable construction was held to be that "[t]he defendant must have known the contents of the material, and must have been in some manner aware of its obscene character." (People v. Campise, 242 Cal. App.2d Supp. 905, 915.) Penal Code section 311(e) was amended, effective November 10, 1969, to provide that "'[k]nowingly' means being aware of the character of the matter . . . ."

The instructions as to knowledge given in the case at hand are as follows: "The word 'knowingly' as used in the context of Penal Code Section 311.2, means that each of the defendants must have known the contents of the material, and must have been in some manner aware of its obscene character. It is not necessary to construe 'knowledge that the matter is obscene' as meaning that each of the defendants knew that a Court would decide the matter to be legally obscene, . . .

"Nor is direct evidence that each of the defendants has personally viewed the films in question necessary, for knowledge may be established by circumstantial evidence."

The jury was instructed properly either under the statute as it stood prior to 1969 (*People* v. *Campise, supra; People* v. *Pinkus,* 256 Cal.App.2d Supp. 941, 949-950) or under its later amendment. There was no necessity, as appellant contends, to repeat the definition of obscenity and require the jury to find appellant had knowledge of the presence of all elements of such a definition.

Appellant also complains of the following instructions: "In determining the question of whether the allegedly obscene matter is utterly without redeeming social importance, you may consider the circumstances of sale and distribution, and particularly whether such circumstances indicate that the matter was being commercially exploited by the defendants for the sake of its prurient appeal. Such evidence is probative with respect to the nature of the matter and can justify the conclusion that the matter is utterly without redeeming social importance. The weight, if any, such evidence is entitled in [sic] a matter for you, the Jury, to determine.

* * *

"Circumstances of production and dissemination are relevant to determining whether social importance claimed for material was in the circumstances pretense or reality. If you conclude that the purveyor's sole emphasis is in the sexually provocative aspect of the publication, that fact can justify the conclusion that the matter [is] utterly without redeeming social importance."

These instructions conform to the language of Penal Code section 311(a)(2) which was added to the statute in the 1969 amendment. In 1966 the Supreme Court in *Ginzburg v. United States,* 383 U.S. 463 recognized the probative value of evidence a defendant was exploiting, for commercial purposes, material openly advertised to appeal to the erotic interest of his customers, an activity referred to as "pandering." In 1967 the California Supreme Court in *People v.*

Noroff, 67 Cal.2d 791, 793, pointed out that the Legislature had not created the crime of pandering. The court did not, however, disapprove of any use of evidence of pandering for its probative value on the issue of whether the material was obscene. It merely rejected the concept of pandering of nonobscene material as a separate crime under the existing laws of California.

The 1969 amendment did not make pandering of nonobscene material a separate crime. Rather it clarified the use to which evidence of pandering might be made in the determination of whether one of the requirements of obscenity existed, *i.e.,* lack of any redeeming social value. It did not aggravate the punishment for the offense, create a crime which did not previously exist, or deny the accused a vested defense. The application of the amendment to the appellant's trial does not contravene the constitutional doctrine prohibiting ex post facto laws. (See *People v. Bradford,* 70 Cal.2d 333, 343-344, fn. 5; *People v. Snipe,* 25 Cal.App.3d 742, 747-748.)

Appellant also contends that there is no substantial evidence to support a finding that the films in question went beyond the "customary limits of candor" or that the predominant appeal of the films was to the "prurient interest" of the average person, as required by section 311 et seq. of the Penal Code.

" 'Obscene matter' means matter, taken as whole, the predominant appeal of which to the average person, applying contemporary standards, is to prurient interest, i.e., a shameful or morbid interest in nudity,

sex, or excretion; and is matter which taken as a whole goes substantially beyond customary limits of candor in description or representation of such matters; and is matter which taken as a whole is utterly without redeeming social importance." (Pen. Code, § 311(a); see *Roth v. United States,* 354 U.S. 476, 488-489.)

The test of community standards applies to the questions of whether the predominant appeal of the material is to "prurient interest" and also to the question of whether the material exceeds the "customary limits of candor." (*In re Giannini, supra,* 69 Cal.2d 563, 572-574.) A statewide rather than a national standard is applicable to judge community standards where the subject matter is "obviously not intended for nationwide dissemination." (*In re Giannini, supra,* at 579.) The prosecution, in order to bear its burden of proof, must introduce evidence of community standards through expert testimony, since the judge or jury, which makes the initial factual determination, and later the appellate court, which must reach an independent decision as to the obscenity of the material (*Zeitlin v. Arnebergh,* 59 Cal.2d 901, 908-909), do not compose a cross-section of the community. (*In re Giannini, supra,* at 574-576.)

To establish that these films exceeded the contemporary community standards of candor in California, the People presented Officer Barber of the Los Angeles Police Department. The trial court ruled that he was "qualified to give his opinion in the area of

obscenity, the general area of obscenity." He had viewed the films in question as well as other films brought to the attention of his department during the period in question. He testified that the depiction on film of close-ups of sexual intercourse, oral copulation, sodomy and masturbation were beyond the customary limits of candor in the State of California. There was no evidence to the contrary. A viewing of the films indicates they do depict these activities.

Appellant objects to the testimony of Officer Barber as an expert witness but it is clear that this officer's interviews and studies of interviews for a state survey, the questioning of laymen, and participation in civic panels were directed toward ascertaining the standards of the community in the area of obscenity. We have concluded that the court did not err in admitting this testimony and in instructing the jury regarding the weight to be given it.

The other expert witness for the prosecution was Dr. Peschau who testified that he had experience in evaluating the psychologically healthy, as well as the mentally ill and sexually disturbed. He testified that, in his opinion, the predominant appeal of the films was to a prurient interest. Appellant's objections to his qualifications and opinion go to the weight of his testimony.

The fact that Dr. Peschau and Officer Barber expressed their opinions in terms of ultimate facts does not render their testimony inadmissible. (Evid. Code, § 805; *People v. Cole,* 47 Cal.2d 99, 105.) The jurors were instructed that they were not bound by the tes-

timony of the experts but should give it the weight to which they found it to be entitled and disregard it if they found it to be unreasonable.

We have viewed the movie films and have concluded that the jury did not err in its findings of obscenity.

The judgment is affirmed.

Brown (H. C.), J.

We concur:

Draper, P.J.

Caldecott, J.*

1 Crim. 10255

*Presiding Justice of the Court of Appeal sitting under assignment by the Chairman of the Judicial Council.

Appendix B

(NOT TO BE PUBLISHED IN OFFICIAL REPORTS)

In the Court of Appeal
State of California
First Appellate District

DIVISION THREE

1 CRIMINAL NO. 10,255
(SUP. CT. NO. C 123)

People of the State of California,
Plaintiff and Respondent,
vs.
Roy Splawn,
Defendant and Appellant.

[Filed Jan. 11, 1973]

OPINION

This is an appeal from a judgment following a jury verdict of guilty of violation of section 311.2 of the Penal Code (distribution of obscene material). Appellant was charged with selling to one Drivon two reels of movie film depicting sexual activity between two persons and three persons, including sexual intercourse, oral copulation and sodomy.

Appellant contends the jury was improperly selected; that Penal Code section 311.2 is unconstitutional; that the jury was improperly instructed, and that the evidence is insufficient to support the conviction. We have concluded that appellant's contentions are without merit for the reasons set forth below:

Appellant contends that the jury was improperly selected in that prospective jurors were excluded from the venire because they had not been residents of the county for one year. Appellant argues that the residency requirement incorporated in Code of Civil Procedure section 198 deprives him of his constitutional right to trial by a jury selected from a cross-section of the entire community.

It is clear that certain groups united by common interests or characteristics may not be excluded from jury service. The United States Supreme Court has listed six bases on which groups may not be excluded—economic, social, religious, racial, political, and geographical. (Thiel v. Southern Pacific Co., 328 U.S. 217, 220.) It has recently been argued that exclusion in Code of Civil Procedure section 198 of persons under 21 was impermissible but this argument was rejected in *People v. Hoiland,* 22 Cal.App.3d 530, wherein the court pointed out that it was " 'highly speculative whether the decisional outlook of such excluded persons would be different than that of persons a mere few years older.' " (People v. Hoiland, supra, at 536, quoting King v. United States, 346 F.2d 123, 124.) Such an observation is clearly pertinent with regard to the residence requirement. Persons residing in a county under one year come from either sex and from all racial, religious, political and economic groups. They comprise no cohesive group and their exclusion does not deprive a defendant of his right to be tried by a cross-section of the community.

Appellant also argues that the residence requirement arbitrarily deprives a section of the community of their right to be considered for public service. He relies on recent cases wherein certain residency requirements for voting and pursuing elective office have been held to serve no legitimate state interest. (See Keane v. Mihaly, 11 Cal.App.3d 1037, one-year requirement for voting; Camara v. Mellon, 4 Cal.3d 714, three-year requirement to run for city council; Zeilenga v. Nelson, 4 Cal.3d 716, five-year requirement to run for board of supervisors.) These cases have reached the courts by way of petitions brought by persons denied the right to vote or run for office. Assuming *arguendo* that the residency requirement for service on a petit jury is subject to the same principles, the requirement should be challenged by those denied the right to serve. The defendant in a criminal case is not prejudiced by the denial of the right to serve on a jury by virtue of the residency requirement. His right is to be judged by a cross-section of the community and this right is not prejudiced by the residency requirement. Any error in this regard would not require reversal of this case. (Compare People v. White, 43 Cal.2d 740.)

Appellant next contends section 311.2 is unconstitutional in that it violates the equal protection clause by exempting projectionists from its provisions while leaving clerks of bookstores subject to prosecution. Appellant, however, was not a clerk in a bookstore but rather its owner. The rule permitting a person to attack a statute only on constitutional grounds applicable to himself precludes appellant from raising this point. "The rule is well established . . . that one will not be heard to attack a statute on grounds that are not shown to be applicable to himself and that a court will not consider every conceivable situation which might arise under the language of the statute and will not consider the question of constitutionality with reference to hypothetical situations. [Citations.] Petitioner has not shown that the statute is being invoked against him in the aspects or under the circumstances which he suggests, and hence may not be heard to complain." (In re Cregler, 56 Cal.2d 308, 313; People v. Maugh, 1 Cal.App.3d 856, 862; compare In re Davis, 242 Cal.App.2d 645, 666.)

Appellant also attacks the constitutionality of this section on the additional ground that it goes beyond the area of legitimate state control. His position is that a state can only make criminal the dissemination of obscene material to juveniles, unwilling adults, or the "pandering" of such materials to prurient interest. This position was rejected by the California Supreme Court in *People v. Luros,* 4 Cal.3d 84. Here, as in *Luros,* evidence discloses commercial distribution of obscene material. The films in the present case were sold for $70.00.

Appellant also argues that the jury was misinstructed as to the definition of the word "knowingly" as used in Penal Code section 311(e) and Penal Code section 311.2. The sale of the films occurred on November 7, 1969, and it is the law on that date which applies here.

Between 1961 and 1969, Penal Code section 311(e) provided that "knowingly" meant having knowledge that the matter was obscene. Prior to 1961, the prosecution had to establish that the defendant knew the content of the material but it was not necessary to show that he also knew it was obscene. (People v. Harris, 192 Cal.App.2d Supp. 887, 892, reversed on other grounds; In re Harris, 56 Cal.2d 879; People v. Williamson, 207 Cal.App.2d 839, 846, disapproved on other grounds, In re Giannini, 69 Cal.2d 563, 577.) In 1961 this section was amended to provide that the defendant had to have knowledge that the matter was obscene. This was not interpreted to mean knowledge that a court would decide the matter was obscene. A reasonable construction was held to be that "[t]he defendant must have known the contents of the material, and must have been in some manner aware of its obscene character." (People v. Campise, 242 Cal. App.2d Supp. 905, 915.) Penal Code section 311(e) was amended, effective November 10, 1969, to provide that "'[k]nowingly' means being aware of the character of the matter . . . ."

The instructions as to knowledge given in the case at hand are as follows: "The word 'knowingly' as used in the context of Penal Code Section 311.2, means that each of the defendants must have known

the contents of the material, and must have been in some manner aware of its obscene character. It is not necessary to construe 'knowledge that the matter is obscene' as meaning that each of the defendants knew that a Court would decide the matter to be legally obscene, . . .

"Nor is direct evidence that each of the defendants has personally viewed the films in question necessary, for knowledge may be established by circumstantial evidence."

The jury was instructed properly either under the statute as it stood prior to 1969 (People v. Campise, supra; People v. Pinkus, 256 Cal.App.2d Supp. 941, 949-950) or under its later amendment. There was no necessity, as appellant contends, to repeat the definition of obscenity and require the jury to find appellant had knowledge of the presence of all elements of such a definition.

Appellant also complains of the following instructions: "In determining the question of whether the allegedly obscene matter is utterly without redeeming social importance, you may consider the circumstances of sale and distribution, and particularly whether such circumstances indicate that the matter was being commercially exploited by the defendants for the sake of its prurient appeal. Such evidence is probative with respect to the nature of the matter and can justify the conclusion that the matter is utterly without redeeming social importance. The weight, if any, such evidence is entitled in [sic] a matter for you, the Jury, to determine.

* * *

"Circumstances of production and dissemination are relevant to determining whether social importance claimed for material was in the circumstances pretense or reality. If you conclude that the purveyor's sole emphasis is in the sexually provocative aspect of the publication, that fact can justify the conclusion that the matter [is] utterly without redeeming social importance."

These instructions conform to the language of Penal Code section 311(a)(2) which was added to the statute in the 1969 amendment. In 1966 the Supreme Court in *Ginzburg v. United States,* 383 U.S. 463 recognized the probative value of evidence a defendant was exploiting, for commercial purposes, material openly advertised to appeal to the erotic interest of his customers, an activity referred to as "pandering." In 1967 the California Supreme Court in *People v. Noroff,* 67 Cal.2d 791, 793, pointed out that the Legislature had not created the crime of pandering. The court did not, however, disapprove of any use of evidence of pandering for its probative value on the issue of whether the material was obscene. It merely rejected the concept of pandering of nonobscene material as a separate crime under the existing laws of California.

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punishment for the offense, create a crime which did not previously exist, or deny the accused a vested defense. The application of the amendment to the appellant's trial does not contravene the constitutional doctrine prohibiting ex post facto laws. (See People v. Bradford, 70 Cal.2d 333, 343-344, fn. 5; People v. Snipe, 25 Cal.App.3d 742, 747-748.)

Appellant also contends that there is no substantial evidence to support a finding that the films in question went beyond the "customary limits of candor" or that the predominant appeal of the films was to the "prurient interest" of the average person, as required by section 311 et seq. of the Penal Code.

"'Obscene matter' means matter, taken as whole, the predominant appeal of which to the average person, applying contemporary standards, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion; and is matter which taken as a whole goes substantially beyond customary limits of candor in description or representation of such matters; and is matter which taken as a whole is utterly without redeeming social importance." (Pen. Code, § 311(a); see Roth v. United States, 354 U.S. 476, 488-489.)

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standards where the subject matter is "obviously not intended for nationwide dissemination." (In re Giannini, supra, at 579.) The prosecution, in order to bear its burden of proof, must introduce evidence of community standards through expert testimony, since the judge or jury, which makes the initial factual determination, and later the appellate court, which must reach an independent decision as to the obscenity of the material (Zeitlin v. Arnebergh, 59 Cal.2d 901, 908-909), do not compose a cross-section of the community. (In re Giannini, supra, at 574-576.)

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ing the standards of the community in the area of obscenity. We have concluded that the court did not err in admitting this testimony and in instructing the jury regarding the weight to be given it.

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We have viewed the movie films and have concluded that the jury did not err in its findings of obscenity.

The judgment is affirmed.

Brown (H. C.), J.

We concur:

Draper, P. J.

Caldecott, J.